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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. 71-577

THE MUNICIPAL COURT, etc.,

Petitioner,

vs. No. L.A. 29852

JAMES PERRINE,

Respondent.

THE MUNICIPAL COURT, etc., et al.,

Petitioners,

vs. No. L.A. 29860

JOANNE L. BAKER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Respondents, pursuant to a procedure authorized by the California Supreme Court

in Burton v. Municipal Court, 68 Cal. 2d 684, 68 Cal. Rptr. 721, 441 P. 2d 281 (1968), attacked the constitutionality of a Los Angeles County bookstore licensing ordinance (Ordinance No. 5860, set forth in detail in the Petition), by first violating it and then seeking writs of prohibition from the California Supreme Court restraining various municipal courts (petitioners herein) from trying respondents for such violations. The respondents operated their bookstores without first securing the license required by the ordinance, were then prosecuted for such violations, and the petitioners overruled demurrers challenging the constitutionality of the ordinance.

The California Supreme Court agreed with respondents that the ordinance was unconstitutional on its face, and issued peremptory writs of prohibition restraining their trials.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED IF ANY PORTION OF THE ORDINANCE IS INVALID

It is important to note that this case was presented to the highest state court by way of a petition for writ of prohibition, a procedure authorized by the California Supreme Court in Burton v. Municipal Court, supra, wherein the court stated, 68 Cal. 2d at 688:

"It is settled that a person has the standing to challenge a statute on the ground that it delegates overly broad licensing authority to an administrative officer whether or not his conduct could be proscribed by a properly drawn enactment and whether or not he has applied for a license. One who could have obtained a license for the asking may call into question the whole scheme of licensing when he is prosecuted for failure to procure it. Standing is recognized in such a situation because of the dangers inherent in tolerating, in the realm of the First Amendment, the existence of a penal statute susceptible of sweeping and improper application."

II CERTIORARI SHOULD BE DENIED BECAUSE PORTIONS OF THE ORDINANCE ARE INVALID

The sale of books, even in the context of commercial activity, is entitled to First Amendment protection. Smith v. California, 361 U.S. 147 (1959). The ordinance which is the subject of the instant case is invalid because it denies bookstore licenses to those persons who have been convicted of certain crimes in the past, such as obscenity. Thus, certain persons are completely deprived of their First Amendment rights because of past conduct, which is a clear prior restraint. Prior

restraints were condemned by this Court as recently as the "Pentagon Papers Case," New York Times Co. v. United States, ___ U. S. ___, 29 L. Ed. 2d 822 (1971).

The ordinance is likewise defective because, whether or not a person has been convicted of certain crimes, if the Public Welfare Commission determines that such person has committed any one of a number of acts (many of which are only vaguely described, and some of which may not actually be criminal) within five years (longer than the statute of limitations for many enumerated crimes) a license may be refused.

The ordinance is defective because at least some (perhaps all) of the acts or crimes bear no rational relationship to the operation of a bookstore.

There are many other defects in the ordinance, some of which are spelled out in the opinion of the California Supreme Court. Desire to keep this response brief precludes a complete listing of all the defects. Every time the ordinance is reread another defect comes to light. The ordinance belongs more in a law school constitutional law class or in a bar examination than in this Court's crowded docket.

Aside from the substantive defects, the ordinance is invalid, or was at the time respondents were first arrested, because it provides, or did provide, only that the Public Welfare Commission may grant a license

after certain findings are made. This defect alone invalidates the ordinance. See Appendix "A" to Petition, pp. 6-7. The California Supreme Court's interpretation of the word "may" is based upon California law and prior California rulings. Dillion v. Municipal Court, 4 Cal. 3d 860 (1971), and thus is not subject to review by this Court.

It is true that "may" was changed to "shall" by amendment to the ordinance (Appendix "D" to Petition), but that fact was brought to the attention of the California Supreme Court long before its decision on September 3, 1971. If the California Supreme Court did not see fit to consider the change, this Court should not.

III THE SEVERABILITY CLAUSE DOES NOT SAVE THE ORDINANCE

Petitioner's arguments concerning severability and the application of the ordinance to respondents completely miss the point made by Burton v. Municipal Court, supra, and the court below, and also fail to consider that it is a licensing ordinance, not a criminal statute, which is the subject of these proceedings. Concise answers to these contentions have previously been rendered by this Court as well as the California Supreme Court. It should suffice to set them forth herein:

In In re Porterfield, 28 Cal. 2d 91, 120 (1946), the California Supreme Court stated:

> "The potential severability of the ordinance, however, can have no effect upon the instant matter. As far as petitioner is concerned the existence of the statute as a whole was an operative fact. The consequences of its existence as such cannot be ignored. In order for petitioner to have secured a license he would have had to have complied with the terms of the ordinance as written."

Fifteen years earlier this Court stated in Smith v. Cahoon, 283 U.S. 553, 563 (1931):

> "The effect of this savings clause is merely that, if one provision is struck down as invalid others may stand. But until such separation has been accomplished by judicial decision, the statute remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left."

CONCLUSION

Because of the change in the ordinance, the method by which the cases were brought to the California Supreme Court, the numerous defects in the ordinance, the failure of petitioners to demonstrate the compelling national importance of these cases, and because the decision of the California Supreme Court is correct and in complete accord with constitutional principles articulated by this Court, it is respectfully submitted that the Petition for Writs of Certiorari should be denied.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Respondents